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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH DANNY PROPHET,

Defendant and Appellant.

C048945
(Sup.Ct. No. 00F07352)

On July 30, 2002, a jury convicted defendant Joseph Danny Prophet of five counts of forgery (Pen. Code, § 475, subd. (c))¹ and, in a trial by court, the court found true an allegation of a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12).

On September 12, 2003, the court sentenced defendant to state prison for six years eight months -- count 1, four years (the middle term of two years doubled because of the strike); and counts 2 to 5, consecutive effective terms of eight months

¹ Further undesignated statutory references are to the Penal Code.

each (one-third the middle term of two years each). Pursuant to section 296, subdivision (a)(1), the court ordered defendant to provide DNA samples.

Defendant appealed; however, he moved to abandon the appeal and on March 24, 2004, we dismissed the case.²

On October 18, 2004, defendant filed a pro se motion for modification of his sentence based upon defendant's belief that the three strikes law did "not fit [his] case" and that the court should have imposed the lower base term.

On February 4, 2005, the court modified defendant's sentence, but not in the manner defendant had requested. The court recognized that it had not, but should have, doubled each of the consecutive four-month terms. Consequently, defendant's sentence was increased by two and one-half years. The court also reimposed the DNA testing requirement pursuant to section 296.

On appeal, defendant contends (1) the imposition of consecutive terms violated his rights under *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], and (2) the order that he provide a DNA sample violates the ex post facto clauses of the United States and California Constitutions. We reject each contention.

² We take judicial notice of our records in *People v. Prophet* (February 19, 2004, C044966). (Evid. Code, § 452, subd. (d).)

DISCUSSION

I

Defendant recognizes that his first claim was rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, 1244. However, he is presenting the argument to preserve the issue for federal review. Pursuant to *Black*, defendant's first contention is rejected. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II

At the time of defendant's original sentencing, section 296, subdivision (a)(1) provided that any person convicted of one of the specified offenses was to give a DNA sample.³ Section 475 was not one of the specified offenses. However, at the time of defendant's resentencing, section 296 had been amended to provide, inter alia, for the giving of DNA samples by any person convicted of any felony offense.⁴

³ In relevant part, section 296 provided: "(a)(1) Any person who is convicted of any of the following crimes, or is found not guilty by reason of insanity of any of the following crimes, shall, regardless of sentence imposed or disposition rendered, be required to provide two specimens of blood, a saliva sample, right thumbprints, and a full palm print impression of each hand for law enforcement identification analysis."

⁴ As amended, section 296, subdivision (a)(1) provided that the body samples previously required to given were now to be given by "Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense."

Defendant contends the giving of the DNA samples is so burdensome that it constitutes punishment within the meaning of the ex post facto clauses of both the United States and California Constitutions. This same argument was rejected in *People v. Espana* (2006) 137 Cal.App.4th 549, 553-556. For the same reasons set forth in *Espana*, we too reject the contention.

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

NICHOLSON, J.